No. 89-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, as Governor of The State of Minnesota, and THE STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 26, 1989
Certiorari Granted January 8, 1990

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INDEX

* A copy of the statutes in question attached to the complaint have been omitted. The relevant statutes appear in the appendix to Petitioner's Brief.

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

RELEVANT DOCKET ENTRIES

Perpich, et al. v. U.S. Department of Defense, et al.

U.S. District Court File No. CV-3-87-54

1-28-87 COMPLAINT—Summons Issued (10 pgs).

3-16-87 SUMMONS RETURNED, SERVED 1-28-87.

4-1-87 DEFTS. NO/MO TO DISMISS, Ret. before DDA on 6-15-87 at 10:00 a.m.

4-7-87 DECLARATION OF JAMES H. WEBB, JR., wi/att exhibits.

4-16-87 PLTFF'S NO/MO FOR SUMMARY JUDGMENT, Ret. before ———— on 6-15-87 at 10 a.m.

8-4-87 MEMORANDUM ORDER (DDA/8-4-87) that pltff's motion for summary judgment is DENIED; Deft's motion for summary judgment is GRANTED; that the Clerk enter judgment as follows: IT IS ORDERED, ADJUDGED & DECREED that plaintiffs' action be and the same hereby is dismissed with prejudice. (counsel served by Judges chambers).

8-10-87 PLAINTIFFS' NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER AND JUDGMENT ENTERED 8-04-87.

8-14-87 TRANSCRIPT OF PROCEEDINGS (LPL) RE: Motion held before DDA on 6-15-87 (separate).

7-24-89 CERTIFIED COPY OF THE OPINION FROM THE EIGHTH CIRCUIT COURT OF APPEALS (McMillian, Heaney, Arnold, Gibson, Fagg, Bowman, Wollman, Magill and Beam-J; filed 6-28-89) that the decision of district court is affirmed.

CERTIFIED COPY OF THE JUDGMENT FROM THE EIGHTH CIRCUIT COURT OF APPEALS THAT: it is ordered and adjudged that the judgment of the district

court in this cause be affirmed in accordance with the opinion of the Eighth Circuit Court. MANDATE ISSUED: 7-20-89.

United States Court of Appeals File No. 87-5345

1987

August 12 DOCKETED APPEAL.

1988

Feb. 9 ARGUED AND SUBMITTED TO JUDGES HEANEY, FAIRCHILD AND MAGILL IN ST. PAUL. John Tunheim, AAG, for the appellant, Deborah Kans, Justice, for the appellee. Rebuttal by Mr. Tunheim. RECORDED.

Dec. 6 OPINION BY HEANEY PUBLISHED. DISSENT BY MAGILL.

Dec. 6 JUDGMENT: Judgment of the district court is reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

Dec. 20 PETITION FOR REHEARING with suggestion for rehearing en banc filed by aplees. w/service.

1989

Jan. 11 ORDER: Appellee's petition for rehearing en banc has been considered by the Court and is granted. The Court's opinion & judgment of December 6, 1988 are hereby vacated. (Correcting Order).

June 28 OPINION BY MAGILL PUBLISHED. DISSENT BY HEANEY, JOINED BY McMILLIAN.

June 28 JUDGEMENT: After consideration, it is ordered and adjudged that the judgement of the district court in this cause be affirmed in accordance with the opinion of this Court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action File No. ——

Rudy Perpich, Governor of the State of Minnesota, and the State of Minnesota, by its Attorney General, Hubert H. Humphrey, III,

Plaintiff,

v.

United States Department of Defense; United States Department of the Air Force; United States Department of the Army; National Guard Bureau; Caspar W. Weinberger, Secretary of Defense; John O. Marsh, Jr., Secretary of the Army; Edward C. Aldridge, Secretary of the Air Force, and Lieutenant General Herbert R. Temple, Jr., Chief, National Guard Bureau,

Defendants.

COMPLAINT

Plaintiffs, for their complaint herein, state and allege as follows:

NATURE OF THE ACTION

1. This is a civil action seeking: (1) injunctive relief against enforcement of any order by defendants commanding members of the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States without plaintiff Perpich's consent; (2) injunctive relief against enforcement of Section 522 of the Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3871 (hereinafter "Section 522"); and (3) the judgment of this Court declaring that Section 522 is in violation of U.S. Const. art. I, § 8, cl. 16 (hereinafter "Militia Clause"). Section 522 modifies 10 U.S.C. §§ 672(b) and (d),

which provide that members and units of the Army National Guard of the United States and the Air National Guard of the United States may not be ordered to active duty without the consent of the appropriate state governor. Section 522 prohibits a state governor from withholding such consent to active duty outside the United States because of objection to the location, purpose, type or schedule of such active duty. (Copies of 10 U.S.C. § 672 and Section 522 are attached to this complaint.) The purpose of this action is to determine plaintiff Perpich's constitutional right to withhold consent to any order of defendants that commands members of the Minnesota units of the National Guard of the United States to train outside the United States in the absence of war, national emergency or other permissible condition.

JURISDICTION

2. This court has original jurisdiction of this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. §§ 1331, 2201 and 2202.

PARTIES

3. Plaintiff Rudy Perpich is governor of the State of Minnesota and Commander in Chief of the state's military forces pursuant to Minn. Const. art. V, § 3, and Minn. Stat. § 190.02 (1986).

4. Plaintiff State of Minnesota has reserved to it the authority of training its militia pursuant to the Militia Clause.

5. Defendant United States Department of Defense is an agency and instrumentality of the United States and is headed by the Secretary of Defense pursuant to 10 U.S.C. § 133.

6. Defendant Department of the Air Force is an agency and instrumentality of the United States and is headed by the Secretary of the Air Force pursuant to 10 U.S.C. § 8012.

7. Defendant Department of the Army is an agency and instrumentality of the United States and is headed by the Secretary of the Army pursuant to 10 U.S.C. § 3012.

8. Defendant National Guard Bureau is a joint bureau of the Department of the Army and the Department of the Air Force and is the channel of communication between the departments concerned and the State of Minnesota on all matters pertaining to the National Guard and the National Guard of the United States pursuant to 10 U.S.C. § 3015.

9. Defendant Caspar W. Weinberger is Secretary of the Department of Defense and directs and controls the Department of the Air Force and the Department of the Army pursuant to 10 U.S.C. §§ 3010 and 8010.

10. Defendant Edward D. Aldridge is Secretary of the Air Force and is authorized to designate an authority to order members of the Air National Guard of the United States to active duty pursuant to 10 U.S.C. §§ 672(b) and (d).

11. Defendant John O. Marsh, Jr., is Secretary of the Army and is authorized to designate an authority to order members of the Army National Guard of the United States to active duty pursuant to 10 U.S.C. §§ 672(b) and (d).

12. Defendant Herbert R. Temple, Jr., is Chief of the National Guard Bureau.

COUNT I

13. The Militia Clause reserves to the states the authority to train the state militia.

14. The Minnesota National Guard is the organized militia of the State of Minnesota pursuant to Minn. Stat. § 192.01 (1986).

15. Members of the Minnesota National Guard are also members of either the Minnesota unit of the Air National Guard of the United States or the Minnesota unit of the Army National Guard of the United States (hereinafter collectively referred to as the "National Guard of the United States") pursuant to 32 U.S.C. § 101(4-7).

16. Defendants or their individual predecessors have ordered members of the Minnesota unit of the National Guard of the United States to active duty for training missions outside the United States pursuant to 10 U.S.C. § 672(b) or § 672(d).

17. Minnesota National Guard members were ordered by defendants to active duty for three 1987 training missions in Central America conducted January 3-17, January 9-25 and January 22-26.

18. The missions referred to in paragraph 16 and 17 have been for the purpose of training Minnesota National Guard members.

19. Plaintiff Perpich would not have consented to one training mission ordered by defendants in January, 1987, but for the restrictions imposed by Section 522.

20. Plaintiffs reasonably expect that defendants will order members of the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States.

21. Plaintiff Perpich intends to withhold consent to defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to train outside of the United States if he objects to the location, purpose, type or schedule of such training.

22. Section 522 purports to prohibit plaintiff Perpich from withholding consent to defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to train outside of the United States because of objection to the location, purpose, type or schedule of such training.

23. Section 522 violates the Militia Clause by restricting the factors plaintiff Perpich may consider in deciding whether to withhold consent from defendants' orders commanding training outside the United States for members of the Minnesota unit of the National Guard of the United States.

24. Defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to active duty for training outside the United States violates the Militia Clause in the absence of plaintiff Perpich's consent.

25. Plaintiffs will suffer irreparable injury if defendants are not enjoined from commanding members of the Minnesota unit of the National Guard of the United States to train outside the United States without plaintiffs' consent.

26. Plaintiffs will suffer irreparable injury if defendants are not enjoined from enforcing Section 522.

27. The short-term nature of training exercises ordered by defendants for members of the Minnesota unit of the National Guard of the United States precludes full litigation of their constitutionality prior to completion of any particular training exercise.

WHEREFORE, plaintiffs demand judgment against defendants and a decree of this Court as follows:

1. Permanently restraining and enjoining defendants, their employees, agents and servants and any and all other persons or parties acting in concert or participation with them from:

(a) Enforcing Section 522 in any manner, and

(b) Taking any action whatsoever for the purpose or effect of implementing any order of defendants commanding the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States unless and until Governor of the State of Minnesota consents to their order.

2. Declaring Section 522 violative of the U.S. Constitution and, therefore, void and of no effect.

3. Granting such other, further, or different relief, whether legal or equitable, as this Court deems proper, together with

judgment against defendants for costs, disbursements, and reasonable attorney fees incurred on behalf of plaintiffs herein.

Dated: January 28, 1987

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

NO. CV 3-87-0054

RUDY PERPICH, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants.

DECLARATION OF JAMES H. WEBB, JR.

In accordance with 28 U.S.C. §1746, the following unsworn declaration is made pertaining to the above-captioned case.

1. I am the Assistant Secretary of Defense (Reserve Affairs).

2. The attached document is a true and exact copy of the prepared statement I presented to the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services on July 15, 1986.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of March 1987, at Arlington, Virginia.

JAMES H. WEBB, JR.
Assistant Secretary of Defense
(Reserve Affairs)

STATEMENT OF
ASSISTANT SECRETARY OF DEFENSE
(RESERVE AFFAIRS)
JAMES H. WEBB, JR.
HEARINGS BEFORE THE SUBCOMMITTEE
ON MANPOWER AND PERSONNEL
SENATE ARMED SERVICES COMMITTEE
July 15, 1986
FOR OFFICIAL USE ONLY UNTIL RELEASED BY THE SUBCOMMITTEE

JAMES H. WEBB, JR.
ASSISTANT SECRETARY OF DEFENSE FOR
RESERVE AFFAIRS

Mr. James H. Webb, Jr., presently serves as the first Assistant Secretary of Defense for Reserve Affairs, following his confirmation by the Senate on April 27, 1984.

Mr. Webb was born on February 9, 1946, in St. Joseph, Missouri. In 1968 he graduated from the U.S. Naval Academy with a B.S. (Engineering) and was one of 18 in his graduating class of 841 to be awarded the Superintendent's letter of commendation for outstanding leadership contributions. Commissioned in the Marine Corps, he was the honor graduate of his class of 243 members at the Marine Officers Basic School. He served with the 1st Battalion, 5th Marine Regiment in Vietnam as a rifle platoon and company commander, earning the Navy Cross, the Silver Star, two Bronze Star medals for valor and two Purple Hearts.

Mr. Webb earned his J.D. from the Georgetown Law Center in 1975, winning the Horan award for excellence in legal writing. While a student, he wrote his first book, *Micronesia and U.S. Pacific Strategy*, and conducted a special twelve-week

study for the Governor of Guam on U.S. strategy in the Pacific and its effect on land issues in the Mariana Islands.

After graduation he wrote full-time until 1977, publishing *Fields of Fire* (1978), a novel of ground combat in Vietnam. The book was nominated for a Pulitzer Prize and was a finalist in the Hemingway competition for outstanding first novels.

In January 1979, he became the first "visiting writer" at the U.S. Naval Academy, where he taught literature and lectured frequently on leadership and the role of the military in the U.S. society. During this time he completed his third book, *A Sense of Honor* (1981), a novel about the Naval Academy set in 1968.

Mr. Webb served as both Assistant Minority Counsel and as the Minority Counsel for the House Veterans' Affairs Committee. His work included direct liaison with the Department of Defense, Veterans Administration, Health and Human Services, and the Department of Labor on budget, oversight and legislation regarding military veterans.

In July 1981, Mr. Webb left Congress to write *A Country Such as This* (1983), which was nominated for a Pulitzer Prize and the Pen/Faulkner award. In addition to his books, his military writing has included topics on service roles and missions, the draft, strategy and tactics, key manpower issues, and U.S.-Japanese defense obligations.

He has lectured on leadership at numerous military schools and colleges and has made extensive radio, TV, and newspaper appearances on the topics of military manpower, veterans issues, politics and the Vietnam War, Lebanon and Grenada. He received an Emmy award from the National Academy of Television Arts and Sciences for his coverage of the U.S. Marines in Beirut for the McNeil-Lehrer News Hour in 1983.

Mr. Webb received the 1979 American Legion National Commander's Public Relations Award and in 1976 was the first recipient of the Vietnam Veterans Civic Council's Outstanding Veteran Award. Mr. Webb, his wife, JoAnn, and their children, Amy, Jimmy, Sarah, and Julie, reside in Falls Church, Virginia.

(Rev. 1 Oct 85)

Mr. Chairman and members of the subcommittee:

I thank you for the opportunity to appear before the Committee today and present the views of the Department of Defense regarding the proposed legislation to clarify certain National Guard training authorities.

National Guard training is a subject of special importance, because the Army National Guard and Air National Guard have become major, fully integrated elements of our national deterrent strategy, our peacetime operational missions, and our Total Force war-fighting capability.

Today, the Army National Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army. The force structure of the Total Army includes 10 divisions, 14 separate brigades, 2 special forces groups, 4 roundout brigades and 7 roundout battalions of the Army National Guard. In the event of a full mobilization, therefore, 18 of the 28 Army divisions would be provided wholly or in part by the Army National Guard.

The Air National Guard operates and maintains more than 1700 aircraft, organized in 24 wings and 67 groups. In Fiscal Year 1987, the Air National Guard will provide 73 percent of our air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of

air rescue and recovery forces, 14 percent of special operations forces, 24 percent of tactical air support forces, and 4 percent of strategic airlift forces.

This formidable force is almost totally funded by the federal government. Excluding the value of equipment inventory, the federal government annually provides more than 90 percent of all National Guard funding. Since 1981, the Department of Defense and the Congress have invested nearly $47 billion dollars in manning, equipping, and training the Army and Air National Guard.

The Total Force Concept of the early 1970's is a reality in 1986, so much so that contingency plans to counter aggression in both hemispheres cannot be effectively executed without committing National Guard and Reserve forces in the same time frame as active forces. We have increasingly staked our national security on the ability to mobilize, deploy, and employ combat ready National Guard and Reserve members and units anywhere in the world rapidly. Consequently, effective and realistic training throughout the world is a necessity if we are to rely on the men and women of the National Guard to perform their federal mobilization missions within current deployment schedules. Adequate training for National Guard members who have become more directly involved in our defense posture under the Total Force Policy is an operational necessity and also an obligation, owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive.

Recently, valuable National Guard training overseas has been used by certain individuals and special interest groups to affect larger debates on U.S. foreign policy. While these efforts have been focused on Central America, the real issue illuminated by this controversy is the obsolescence of certain

statutory authorities that permit units and members of the National Guard to train outside the United States or its territories. These statutory authorities, enacted by the Congress as a part of the Armed Forces Reserve Act of 1952 (21 years before the advent of the Total Force Policy), require modification that will reflect and support the greater responsibilities of today's National Guard, and the more intense and realistic training now required to ensure it is fully ready to perform the world-wide missions it has been assigned.

I will come back in a moment to the subject of realistic training for the National Guard in today's Total Force environment and the risk posed by those who would interfere with it for political purposes. But first, I would like to address the constitutional question regarding the interaction of the militia clause and the army clause contained in Article I, section 8 of the Constitution.

THE DUAL STATUS OF THE NATIONAL GUARD

The militia clause of the U.S. Constitution provides that:

> "The Congress shall have Power . . . To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Prior to 1903, the National Guard was organized and administered solely under the militia clause of the Constitution. Consequently, the National Guard was available only for limited duties. As one example, the Governors of Massachusetts and Connecticut refused the President's call for the militia when the British blockaded our coasts in 1813, invaded our territory, and destroyed the capitol. As another, the militia was not

available during the Mexican War of 1846. And, with the exception of those members of the militia who volunteered to serve outside the United States, the militia was again unavailable during the Spanish-American War of 1898.

In the years that followed, Congress began to exercise its dormant power to organize and regulate the militia. This power was first exercised in the Dick Act of 1903, which provided for an Organized Militia, known as the National Guard, equipped through federal funds, and trained by Regular Army instructors. The scope of federal control was further broadened in the Act of 1908, the National Defense Act of 1916, and the Army Reorganization Act of 1920. These exercises of Congressional power made the National Guard available for service abroad; funded National Guard armory drills; required the states to conform to the provisions of the law to obtain federal money; curtailed the constitutional provision "reserving to the States . . . the Appointment of Officers" by prescribing the qualifications of National Guard officers and providing for their recognition by federal authorities; required every officer and enlisted member of the National Guard to take a dual oath to support the Nation and the state and to obey the Governor and the President; made National Guard officers eligible for Reserve commissions; and provided for a Guardsman as the Chief of the Militia Bureau of the War Department.

Even here, however, there were limitations. For instance, members of the National Guard were required to be conscripted in order to be brought into federal service during World War I.

Finally, in the Act of June 15, 1933, the Congress resolved long-standing problems posed by the limitations of the militia clause by making the National Guard a part of the Army at

all times. It did this by exercising its powers under Article I, section 8, clause 12 of the Constitution "to raise and support armies. . ." to constitute the Guard as a reserve component of the Army called the National Guard of the United States. As a reserve component of the Army, the National Guard of the United States was to be organized and administered under the army clause of the Constitution, not the militia clause, and its units could be ordered into federal service. The Militia Bureau was done away with, and the National Guard Bureau was established in its place.

The dual state-federal status of the National Guard established by the Congress in 1933 remains intact today. The National Guard has, at the same time, a state role as the Army National Guard or the Air National Guard and a federal role as the Army National Guard of the United States or the Air National Guard of the United States. The fact that the National Guard may train or operate, at various times and under various circumstances, in either a federal status or a state status, does not affect or alter its dual status. On the contrary, the character of National Guard service at any given point in time is a manifestation of the dual state-federal status of the National Guard.

The current statutory basis for the Guard reflects Congressional intent that the National Guard is "a part of the Army at all times" and that "every guardsman is a Federal reservist as well as a State militiaman." H.R. Report No. 1066, 82d Cong., 1st Sess. pg. 9 (1951). The matter of when the National Guard shall serve in a federal status, with or without the consent of a governor, is a legislative issue for the Congress to resolve, and not a constitutional issue.

In considering the legislative proposal to require that training of the National Guard outside the United States, its territories, and possessions shall be conducted in active federal service, the Office of the General Counsel has concluded the militia clause does not present a constitutional obstacle to such legislation because National Guard units and members, whether or not in actual federal service, have a dual status, both as the organized militia (the Army and Air Force National Guard, 10 U.S.C. section 101 (10), (12)) and as units and members in the reserve components of the Army and Air Force (Army and Air Force National Guard of the United States, 10 U.S.C. section 101 (11), (13)). This dual status reflects the fact that the constitutional authority for the statutes governing the Guard stems not only from the militia clause, but also from the broad power of the Congress to "raise and support armies," U.S. Const., art. I, section 8, cl. 12. *See* Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 207-10 (1940). Therefore, regulation of the National Guard when not in federal service is not governed solely by the militia clause.

The continued status of guardsmen as members of a federal reserve component under the army clause of the Constitution, even when not in actual federal service, is underscored by statutes such as 10 U.S.C. sections 3686 and 8686, which provide that their training as members of the National Guard is considered to be training in federal service for purposes of providing benefits to members of federal reserve components.

The Congress alone is empowered under the army clause to determine when the National Guard shall serve in federal status (active duty), and the militia clause is not an obstacle to exercising its legislative power. *See* Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969).

This Congressional authority also includes power to establish the training requirements of the National Guard.

THE TRAINING REQUIREMENTS OF THE NATIONAL GUARD

The training requirements of the National Guard have been established by the Congress in chapter 5 of title 32 of the United States Code. Section 501 of title 32 provides that:

> "The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force."

Section 502 provides that National Guard units are required, under regulations prescribed by the Service Secretaries, to "participate in training at encampments, maneuvers, outdoor target practice or other exercises, at least 15 days each year." Section 503(a) further provides that:

> "Under such regulations as the President may prescribe, the Secretary of the Army and the Secretary of the Air Force, as the case may be, may provide for the participation of the National Guard in encampments, maneuvers, outdoor target practice, or other exercises for field or coast defense instruction, independently or in conjunction with the Army or Air Force, or both."

The authority of the federal government to regulate these matters is underscored by section 108 of title 32 of the United States Code, which provides that:

> "If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law."

The broad authority of the Service Secretaries under sections 502 and 503 necessarily includes the authority to specify the location of such activities. Consequently, this authority may be used to require National Guard training outside the United States. As an integral part of the Total Force, National Guard members and units now receive the best and most realistic overseas training that can be provided in order to ensure they are prepared to fulfill their federal mobilization missions.

NATIONAL GUARD TRAINING OUTSIDE THE UNITED STATES

Legislation enacted in the throes of the Korean War provided, for the first time, a comprehensive and satisfactory scheme of voluntary and involuntary training for the reserve components of the armed forces. Subsequent revisions to reserve component training and mobilization statutes begun in the early 1950's provided the framework for a National Guard and Reserve that would be truly ready to mobilize and deploy on short notice, and which could and would participate in joint exercises with the active forces and work side-by-side in accomplishing peacetime missions.

The Guard wasted little time in adjusting to the national requirement for the reserve components to become a "force in being." By the late 1950's, 20 Air National Guard tactical squadrons were participating in the Air Defense Augmentation Program. By 1967, the annual contribution of Air National Guard fighter units involved more than 17,000 missions, including more than 40,000 successful intercepts and nearly 90,000 man-days on alert, of which 7,500 were on nuclear alert.

In 1961, during the Berlin Crisis, 76,000 Army National Guard and Air National Guard members were ordered to extended active duty. Air National Guard units deployed to Germany, France, and Spain. During the 1960's, the Air

Guard also began support of an overseas command on a regular basis for the first time. Air National Guard refueling units were deployed to Central Europe in 1967 to provide refueling training and an emergency capability to USAFE tactical aircraft. Throughout the decade of the 60's, the Air National Guard supported the Military Airlift Command in Southeast Asia, Labrador, Greenland, the Congo, Europe, Australia, the Dominican Republic and elsewhere. These missions were flown on a volunteer basis and as part of normal training requirements.

In 1977, 26 Army National Guard company-sized units participated in annual training outside the United States. Five years later, 43 units and nearly 7,000 members of the Army National Guard participated in overseas deployment training. In 1985, more than 39,000 Army and Air National Guard members completed overseas training in 44 countries and 64 exercises. By the end of 1986, more than 42,000 National Guard members will have participated in overseas training and 69 exercises in 46 countries, including countries in Central America.

This year, 9,000 National Guard members from 43 states and territories will train in Central America. Of these, 5,300 National Guardsmen from 18 states will deploy and train in Honduras. This is not a new concept. The National Guard has been training in Central America since the early 1970's. The National Guard and Reserve train throughout the world to achieve the operational readiness levels required of their units. The added realism of training outside the United States, in terrain, climate, transportation and use of equipment, differences in operating procedures, and language, provides the best environment that tests every member of a unit and enhances readiness.

THE SOURCE OF THE PROBLEM

Obviously, intercepts of aircraft approaching U.S. airspace and nuclear alert duties cannot be performed by guardsmen in state status. Similarly, members of the National Guard who perform training or duty outside the United States, its territories, or possessions must be ordered into federal service (active duty) in order to comply with our responsibilities under international agreements on defense cooperation, to ensure that clear military lines of command and authority operate while our forces are in areas outside the jurisdiction of the United States, to protect individual National Guard members under status of forces agreements and international law, and to ensure that their status and benefits are not jeopardized should they be subjected to terrorist acts while training overseas or traveling to or from overseas training sites. Federal service also is required since members of the National Guard not in federal service do not possess rank, seniority, or military justice equivalence with active component forces.

For these reasons, members and units of the National Guard always are ordered into federal service for the purpose of training outside the United States.

In exercising its power to determine when the National Guard shall serve in federal status, the Congress has provided only two statutory authorities for ordering members or units of the National Guard to active duty for the purpose of training. These authorities are found in sections 672(b) and 672(d) of title 10 of the United States Code. All other statutory authorities governing the call of the National Guard to active duty pertain to a declaration of war or national emergency by the Congress, a declaration of national emergency by the President, or the Presidential 100,000 call-up to augment the active forces for an operational mission.

Sections 672(b) and 672(d) provide that:

"(b) At any time, an authority designated by the Secretary concerned may without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection *without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.*" [emphasis added]

• • • • • • • • •

"(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection *without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.*" [emphasis added]

While neither of these statutory provisions specifically address National Guard training outside the United States, they are the only authorities available, short of war or national emergency, that enable us to satisfy the requirement for service in an active duty status while outside the United States. Consequently, even when the National Guard is in federal service

for the purpose of training abroad, no member or unit may train in such federal status, voluntarily or involuntarily, without the consent of the state or territorial governor concerned.

The statutory source of the requirement in sections 672(b) and (d) for the governor's consent is section 233(c) and (d) of the Armed Forces Reserve Act of 1952. And, before I go any further, I believe it is important at this point to reiterate that the determination of when the National Guard shall serve in a federal status is a power exercised by the Congress under the army clause of the Constitution. It was the Congress, in the Armed Forces Reserve Act of 1952, and not the Constitution, that granted to the governors of the states and territories the authority to give or withhold their consent to training National Guard members in a federal status.

Although the legislative history is not extensive, it does show that the requirement for the governor's consent to training in a federal status was added to the Armed Forces Reserve Act at the request of the National Guard Association. (U.S. Congress, House. Armed Services Committee. Hearings, 82nd Cong., 1st Sess., 1951. (See "Reserve Components," p.788)). It was apparently designed to meet objections that the proposed legislation, which was broadly worded, tended to unduly alter the balance between federal and state roles of the National Guard. Congress indicated that the purpose of the Act was not to alter the traditional role of the Army and Air National Guard in the defense structure. In the context of annual training, for example, the *proviso* for the consent of the governor was apparently intended to act as a safeguard so that section 233(c) of the Act would not be construed to affect the authority for training of Army and Air National Guard units in a state status.

There is no way that the Congress in 1952 could have foreseen the evolution of the Total Force Policy two decades later that would so alter the training environment of the National Guard. When it added the "without the consent of the governor" provisions of section 672, overseas training missions did not exist, and other training was being conducted largely on outmoded equipment for long-term, standby missions.

THE PROBLEM

For many years, realistic National Guard training outside the United States has not been a controversial issue or problem. However, beginning in 1985 and particularly this year, special interest groups and some state legislators discovered that the authority granted state governors in sections 672(b) and (d) rendered state governors susceptible to political pressure on controversial Administration policies. Moreover, such pressure could be exerted at the local level and, due to media interest in such controversy, given national exposure. Consequently, the governors' authority has become a vehicle to debate or influence foreign policy.

In January, 1985, the Governor of California refused to permit 450 unit members of the California National Guard to participate in AHAUS TARA III, a combined anti-armor training exercise in Honduras. The National Guard Bureau was forced to use the Texas National Guard, but it could not do so until the Governor of Texas was provided a briefing on the exercise and given specific assurances of troop safety.

In January, 1986, the Governor of Maine refused to permit members of the Maine National Guard to participate in GENERAL TERENCIO SIERRA 86, a road building exercise in North Central Honduras, and another training exercise in Panama. In addition to his concern for the safety of members of the Maine National Guard, Governor Brennan said in an article in the *Kansas Journal*:

> "I also believe that any military presence, regardless its intent, in a country like Honduras, whose economic and educational needs far outstrip its military needs, will foster misunderstanding and aggravate any misgivings. A hostile reaction to such a presence is blind to a distinction between those who carry rifles and those who carry shovels. Thus, I believe it is a needlessly dangerous course being pursued, but it is a course that governors throughout the country can—and should—alter."

Since January of 1985, the dimension of this problem has grown considerably. As of today, three governors (California, Maine, and Ohio) have refused to permit National Guard units and members to participate in training in Honduras. Three other Governors (Massachusetts, Vermont, and Washington) have said they would not permit such training if their permission was requested. Six governors (Arizona, California, New Mexico, New York, Texas, and Puerto Rico) have conditionally permitted National Guard training in Central America but have reserved their consent for a case-by-case determination. Twenty state legislatures have considered the issue of National Guard training in Central America and remain divided. Last March, the Iowa House passed a non-binding resolution calling on the Governor to cancel the participation of an Iowa National Guard medical and dental unit in a training exercise in Honduras. In April, the California Senate also passed a non-binding resolution urging the Governor to:

> ". . . reverse his decision forthwith and bring home the members of the California National Guard now in Honduras, and to join with the Governors of other states in declining to send members of the National Guard to Honduras; . . ."

And, according to the *Los Angeles Times*, July 8, 1986, two California Assemblymen:

"... are pushing ahead with plans for an amendment to the state Constitution that would require the Legislature's approval before the governor could allow guardsmen to be sent to any country where there had been armed conflict within two years."

Last month, the Americans for Democratic Action Foundation filed a Complaint in the Los Angeles Superior Court on behalf of three plaintiffs seeking a Preliminary Injunction, Permanent Injunction, Declaratory Relief, and a Temporary Restraining Order restraining the Governor of California from permitting the California National Guard to deploy outside the United States without a declaration of a national emergency or war. The court denied the request for a Temporary Restraining Order and scheduled a July 14, 1986 hearing on the petition for a Preliminary and Permanent Injunction.

This is no longer a case of a few isolated incidents; it is a demonstrated way for dissent groups, state legislators, and state governors to seize a forum to debate foreign policy. To date, the issue has been focused on Central America, which is precisely where some governors and the special interest groups want it to be focused. But, the issue is not Central America. It is the equal readiness of National Guard units which will deploy more quickly than ever before in our history if we were to go to war, which are equipped with modern equipment against that possibility, and which must train on an equal level with their active counterparts. Under present law, it is conceivable, and quite possible, that similar interference could take place in routine and uneventful National Guard training in Europe, Korea, the Mideast, any other geographic region, and even with specific operations such as the recent Air National Guard participation in refueling the aircraft that conducted the Libyan raid.

THE ALTERNATIVES

In the absence of clarifying legislation to bring parity between National Guard, Reserve, and Active forces with respect to their obligations to train outside the United States, the alternatives are to do nothing; to reconsider the present distribution of missions between the National Guard and the other reserve components of the Army and Air Force; to give the fullest resourcing under the Total Force Policy to those units that are able to participate in "real world" training missions since those units, by the nature of their training, are the units that can be counted on at the onset of a mobilization; or to leave this matter as a subject of case-by-case negotiation, dependent on the goodwill of various governors, legislatures, and protest movements.

Doing nothing jeopardizes the combat readiness of those units affected. It also may foster 54 foreign policies inconsistent with that of the United States Government. Indeed, we are here today precisely because this has, to a lesser extent, already occurred. I can tell you, in the case of the latter alternative, that trying to stay in front of politically motivated groups in 54 states and territories can be a futile effort. And even when it is successful, the effort can prove costly. As an example, a governor recently made an overnight visit to Central America by way of U.S. government jet aircraft, which he had requested. He was accompanied by the state Senate President Pro Tem and the state House Speaker to observe the state's National Guard members in action. This overnight, goodwill effort, while producing favorable reactions from the three state officials, would have cost the American taxpayer approximately $86,000 had the Department of Defense not required that the air support be provided on a reimbursable basis. The cost will now be borne by the state's taxpayers.

Apart from cost, it should not be a function of the Department to traverse the country trying to convince as many individuals or groups who seek to politicize the training environment of the National Guard of something we have known for many years—that overseas training missions are absolutely essential to fully preparing the National Guard to execute the mobilization missions it has been assigned.

CONCLUSION

In conclusion, Mr. Chairman, the proposed legislation would not alter the basic framework which provides that National Guard training will be conducted by the states under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force in conformance with training of the Army and the Air Force. It would not alter the well-established fact that until the National Guard is ordered into federal service it remains in a state status subject to the control of the governor. It would not alter the status in which National Guard members now routinely serve when training outside the United States. Nor would it impose any greater burden on National Guard members than that presently borne by members of all other federal reserve components.

When Congress passed the Armed Forces Reserve Act of 1952, it delegated to the governors of the states a portion of its power to determine when the National Guard would serve in a federal status. That delegation, however, was predicated upon the very broad language of section 233(c) which, but for the requirement of the governor's consent, would have permitted ordering the National Guard to active duty for all training purposes. This is not the case at hand. Since National Guard training outside the United States must be conducted in federal service, and since the proposed legislation is restrictively limited to such training overseas, the proposed legislation does not affect, and could not be construed to affect, the authority for training National Guard units in all other instances in a state status.

I am mindful of the sensitivities of rescinding an authority of a governor, once granted. But, it should not go unnoticed by the Congress that those sensitivities can be more offended by perceptions than they can by any real loss of authority. The consent provisions of sections 672(b) and (d) have not always been exercised by governors. In fact, it is not incorrect to say that some governors, until recently or possibly even now do not know that certain members or units of their National Guard are training overseas. For example, Air National Guard Regulation 35-03, which applies to all Air Guard members serving in a full-time military duty status in accordance with section 502(f) of title 32, specifies that the orders that place these members in a full-time military duty status will include the statement:

> "Authority is given for any mission-directed OCONUS TDY that the individual will automatically be placed under 10 USC 672(d) for duration of TDY and will automatically revert back to 32 USC 302(f) after completion of TDY."

It further specifies, for aircrew members who perform alert duties, the statement:

> "Authority is given for any period of alert duty that the individual will automatically be placed under 10 USC 672(d) for the duration of that period, and automatically revert back to 32 USC 302(f) after completion of the period of alert duty."

In effect these statements, routinely used by the Air National Guard, presume standing consent. While the law requires the governor's consent whenever a member or unit of the National

Guard is ordered to active duty under the provisions of section 672(d), actual consent is not always a routine practice.

I want to make it clear that we most emphatically do not support a revision of the dual status of the National Guard as both a state and a federal force. As is readily apparent, the structure is legally complex, but the result has been a resounding success that is uniquely American. The National Guard has provided the states with well-trained and readily available forces for use during civil disorders and natural disasters. It also has provided the United States with two reserve components that figure prominently in our national defense and account for more than one-half our total Selected Reserve manpower.

The problems which we discuss today are, in my view, primarily technical in nature. They can be resolved. The Congress has gone to great lengths in the law to ensure that members of the National Guard who are serving in state status receive full credit and protection as though they were serving in federal status. This shows we can deal with this complexity to protect the member, to preserve the prerogatives of the states, and to make certain all training requirements of the Army National Guard and Air National Guard are fully met. Thus, it is all the more critical that a successful resolution to the matter under discussion be achieved without delay.

While we refer with great and justifiable pride to the development of the National Guard during the past 350 years, from the Old North Regiment of the Colonial militia in 1636 to today's modern army and air units, we also know that the success of this development has been dependent on accommodation to changing realities and the role of the United States as a leader of the free world.

In 1776, George Washington warned the Congress that "[t]o place any dependence upon the Militia, is, assuredly, resting on a broken staff." We have come a long way in 210 years. Some of these developments during these years were made in response to hard experience, others were the result of foresight.

We do not believe that legislative changes of the form under discussion would significantly revise the actual practice of training the National Guard units as it has evolved over the last 35 years. It would, however, remove an important anomaly in current law and eliminate an improper forum for the debate of foreign policy at the expense of those who train, and who will fight, to defend it.

Thank you, Mr. Chairman.

(Title omitted.)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

December 6, 1988

Order entered in accordance with opinion.

ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals,
Eighth Circuit

(Title omitted)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

June 28, 1989

Order entered in accordance with opinion.

ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals,
Eighth Circuit